

GARY HENNIS

IBLA 87-632

Decided March 30, 1989

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring three unpatented placer mining claims abandoned and void. CMC-180659, CMC-180660, CMC-194170.

Reversed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

The owner of an unpatented mining claim located on public land is required by 43 U.S.C. | 1744 (1982) and 43 CFR 3833.2 to file evidence of assessment work performed or a notice of intention to hold with the proper BLM office on or before Dec. 30 of each calendar year. By regulation 43 CFR 3833.0-5(m), the Department considers such documents to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows compliance with that regulation, a BLM decision declaring a claim abandoned and void based on an untimely filing must be reversed.

2. Administrative Procedure: Administrative Record--Evidence: Generally--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

By regulation 43 CFR 3833.0-5(m), the Department considers affidavits of annual assessment work or notices of intention to hold to be timely filed if placed in an envelope postmarked by the U.S. Postal Service on or before Dec. 30 and received in the proper BLM office on or before the following Jan. 19. Where the record shows that a mining claimant utilized the U.S. Postal Service to deliver his affidavit of assessment work and that it was received by the proper BLM office on Jan. 6, 1986, but the record does not contain the envelope in

which the affidavit was sent, the mining claimant will not be required to bear the consequences of BLM's failure to retain the envelope, and a decision declaring the claim abandoned and void will be reversed.

APPEARANCES: Gary Hennis, Stillwater, Oklahoma, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE HARRIS

By decision dated June 4, 1987, the Colorado State Office, Bureau of Land Management (BLM), declared abandoned and void three unpatented placer mining claims 1/ for failure to timely file either an affidavit of assessment work performed or a notice of intention to hold the claims for 1985 and 1986. Gary Hennis (Hennis), the owner of the claims, appeals that decision.

The record contains an affidavit of assessment work performed for all three claims date stamped January 2, 1987, by the Colorado State Office, BLM. Attached to this document is an envelope, addressed to BLM, bearing a United States Post Service postmark of December 30, 1986; appellant's return address; and certified mail serial number P 123 958 968. Accompanying appellant's notice of appeal is a photocopy of a return receipt card for certified mail serial number P 123 958 968, indicating January 2, 1987, as the date of delivery. Appellant also includes a copy of Post Office Form 3800 showing certified mail serial number P 123 958 968; this form clearly indicates that the article associated with that serial number was mailed on December 30, although the year is illegible.

Another affidavit of assessment work performed for the three claims appears in the record bearing a Colorado State Office, BLM, date stamp of January 6, 1986. Taped to the affidavit is a piece of paper on which appellant's name and address are handwritten. It appears that the paper was cut from the return address portion of an envelope; however, the file does not contain the remainder of the envelope. 2/ Attached to Hennis' notice of appeal is a photocopy of a return receipt card for an article addressed to "U.S. Dept. of Interior," indicating January 6, 1986, as the date of delivery.

[1] The owner of an unpatented mining claim is required by 43 U.S.C. | 1744(a)(1) and (2) (1982) and 43 CFR 3833.2-1(d) to file evidence of assessment work performed or a notice of intention to hold the mining claim on or before December 30 of each calendar year. Failure to file the required instruments is conclusively deemed to constitute an abandonment of

---

1/ Those claims, the Hidden Hole #1 through #3, are designated by serial numbers CMC-180659, CMC-180660, and CMC-194170, respectively. All three claims are located in San Juan County, Colorado. Hennis located the Hidden Hole #1 and #2 on Sept. 2, 1981, and the Hidden Hole #3 on Aug. 25, 1982.

2/ Similar pieces of paper are stapled to Hennis' affidavits for 1982 through 1984, and no envelopes for those years are included in the record. Thus, it appears that BLM's practice prior to 1986 was to discard the envelopes which contained the affidavits of assessment work.

the mining claim under 43 U.S.C. | 1744(c) (1982). "File" is defined in 43 CFR 3833.0-5(m) as "being received and date stamped by the proper BLM office." That same provision states, "'timely filed' means being filed within the time period prescribed by law, or received by January 19th after the period prescribed by law in an envelope bearing a clearly dated postmark affixed by the United States Postal Service within the period prescribed by law."

We conclude that BLM improperly declared these claims abandoned and void for failure to make timely filings in 1985 and 1986 for the following reasons. First, the record provides conclusive evidence that in accordance with 43 CFR 3833.0-5(m), Hennis timely filed an affidavit of assessment work for calendar year 1986. Both the date stamped copy of the affidavit and the photocopy of the return receipt card indicate that BLM received the affidavit on January 2, 1987, well before the January 19 deadline. Furthermore, the envelope attached to the affidavit bears a "clearly dated postmark affixed by the United States Postal Service within the period prescribed by law." <sup>3/</sup> Thus, the record shows a timely filing for 1986. <sup>4/</sup>

[2] Unfortunately, the record pertaining to calendar year 1985 is less complete. As evidenced by both the date stamped affidavit itself and the photocopy of Hennis' return receipt card, the affidavit was received by BLM on January 6, 1986, before the January 19 deadline for mailed documents. The return receipt card, along with the paper attached to the affidavit, indicate that Hennis transmitted the affidavit to BLM through the use of the United States Postal Service. In other words, BLM at one point had an envelope, which may or may not have displayed a "clearly dated postmark affixed by the United States Postal Service within the period prescribed by law," but that envelope is no longer part of the record.

In a case involving a number of appeals of decisions refusing to grant reinstatement of terminated oil and gas leases, R. G. Price, 8 IBLA 290 (1972), the Board commented on the facts involved in one of those appeals, as follows at 292-93:

Since it was the action of the State Office in destroying the envelope that prevents reference to the critical postmark date, the absence of such an important proof should not work to the detriment of the lessee. Accordingly, we accept the lessee's explanation of what occurred and grant reinstatement. As the postmarks on envelopes transmitting rentals are of great importance to the granting of reinstatement, the State Offices are

<sup>3/</sup> In Victor Shepherd, 102 IBLA 334 (1988), the Board held the grace period afforded by 43 CFR 3833.0-5(m) applies only to those documents delivered by the United States Postal Service, and does not apply to a document delivered to BLM by a private courier.

<sup>4/</sup> It appears that BLM's reference to 1986 in its decision was inadvertent because the affidavit received on Jan. 2, 1987, bears the handwritten notation "Timely filed - see postmark."

admonished to retain the same, unaltered, to permit a more accurate assessment of the exercise of due diligence by the lessees.

At the time of the Price decision, there was no oil and gas regulation specifically regarding the postmarks on envelopes transmitting oil and gas rentals; 5/ even so, the Board imposed a duty on BLM to retain such envelopes. The rationale adopted by the Board in the Price case has even greater applicability in the present case because the Department, in promulgating 43 CFR 3833.0-5(m), intended to provide mining claimants some relief from the filing deadline, and in so doing, implicitly required BLM to keep the envelopes in which filings were made. Thus, appellant should not be responsible for bearing the consequences of BLM's failure to retain the envelope. Since the envelope containing appellant's proof of labor apparently was destroyed or discarded by BLM, it would be patently unfair to allow BLM to utilize that fact in support of its position that appellant's calendar year 1985 filing was untimely. The lack of the envelope requires that we find that appellant mailed his proof of labor to BLM in an envelope bearing a United States Postal Service postmark of December 30, 1985, or earlier, and that, under the circumstances, his proof was timely filed. 6/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

—  
Bruce R. Harris  
Administrative Judge

I concur:

Wm. Phillip Horton  
Chief Administrative Judge

5/ The oil and gas regulations now contain a mailing provision at 43 CFR 3108.2-1(a) which provides that "[a] remittance which is postmarked by the U.S. Postal Service, common carrier or its equivalent (not including private postal meters) on or before the lease anniversary date and is received in the proper BLM office or the designated Service [Minerals Management Service] office, as appropriate, not later than 20 days after such anniversary date shall be considered as timely filed." Although the implication of this regulation is that the lease does not terminate, the Board has held that the regulation actually provides a ground for satisfying the reinstatement criterion of reasonable diligence. William R. Barthold, 98 IBLA 293, 295 (1987), and cases cited therein.

6/ Were BLM to produce the envelope in question and that envelope showed a postmark after Dec. 30, 1985, we would be required to uphold the determination that appellant's claims were abandoned and void.